the ordinary course being pursued would lead to injustice, that would give rise to different considerations; but nothing of that sort occurs here.

Now Mr. Roundell Palmer, with great ability, tried to make a distinction in this case, arising from the circumstance, that the object of the company had here come to an end; that there was no railway to be made; and, therefore, he likened it to the ordinary case of a partnership, where the partnership has come to an end, and where there might be a suit by any partner for an account and administration of assets. But it appears to me, that the position in which these parties stand here towards these directors is not at all affected by the circumstance, that it has become impossible to make the railway. What these parties complain of is, that, in the progress towards making the railway, funds got into the hands of the managers of this company, and that those funds have not been duly and properly accounted for. Now it appears to me, that the principle which would have regulated this case, if it were still possible to make the railway, will regulate it exactly in the same way, now that the object of the company has come to an end. There can be no difficulty in the way of these parties having a general meeting called for the purpose of winding up the concern. There is no doubt, that such a meeting could be called, and that, with the sanction of that meeting, a suit might be brought against the directors on the part of the company. That they could have done just as well, now that it has become impossible to make the railway, as if no such impossibility had existed.

At one time I was much struck with the observation, that in one of the articles of the condescendence there is an averment, that proper accounts had not been taken; consequently it was said, that something had been done, that was in violation of the act of parliament, and therefore *ultra vires*. That, in my opinion, is a misapplication of the principle of *ultra vires*. The meaning of *ultra vires* is,—if a corporation, having been constituted for a particular object, appropriates its funds to something else than that object, it is doing something, that impliedly it is forbidden to do by the act of parliament. That is *ultra vires*. But to say, that it is *ultra vires* of the company, that the accounts have not been accurately kept, seems to me to be confounding together two grounds of complaint which are altogether distinct. The very object of the suit for calling the directors to account is to have corrected any irregularites which there may be in the accounts that have been rendered.

My Lords, that being my view of the merits of the case, then the question arises as to other interlocutors—the interlocutors of the Lord Ordinary which never went to the Inner House. Upon that subject it is enough perhaps to say, that is a matter of discretion, but I do not think it would have been a wise exercise of discretion; indeed, I think it would have been a very wrong exercise of discretion to have ordered the production of documents upon a record in which it was obvious, that the record, *rebus sic stantibus*, could lead to no result; because, looking at the record, if I am right in the view which I take of it, the allegations do not amount to any relevant ground of complaint. Consequently the ordering a production of the documents would have been merely an officious interference on the part of the Court. Upon these grounds, therefore, I agree with my noble and learned friend in thinking, that the interlocutor ought to be affirmed.

LORD KINGSDOWN.—My Lords, I am not prepared to express to your Lordships any dissent from the opinions of my noble and learned friends. You have the unanimous opinion of the Court below, and two of your Lordships having expressed a decided opinion to the same effect, I do not see any ground of doubt sufficient to justify my asking for time for a further consideration of this case.

Interlocutors affirmed with costs.

For Appellants, Grahame, Weems, and Grahame, Solicitors, London; W., A. G., and R. Ellis, W.S., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, London; George Wedderburn, W.S., Edinburgh.

MAY 14, 1860.

The REV. DR. GRANT, Collector of the Ministers' Widows' Fund, *Appellant*, *v.* The REV. ARCHIBALD LIVINGSTON and Executrix, *Respoudents*.

Et è contra.

Church—Ministers' Widows' Fund—Stipend, Vacant—Statutes 54 Geo. III. c. 169; 1592, c. 117—Interdict—*A minister having been found guilty by the presbytery, on a libel concluding for his deposition, obtained an interdict against any church judicatory pronouncing sentence against him in the process. Thereafter, the General Assembly having pronounced sentence of*

deposition, he obtained two other interdicts against carrying the same into execution, and against any presentation being issued, and with the view of being continued in the performance of his duties as minister. Ultimately, all the interdicts having been recalled, a competition took place between him and the collector of the Ministers' Widows' Fund, who claimed the stipend, from the date of the sentence of deposition, as vacant stipend.

HELD (affirming judgment), *That the stipend was not vacant within the meaning of the statute till the heritors were served with notice of the sentence of deposition, and the interdict removed, and therefore the claim for the Widows' Fund must be repelled.*

Dr. Grant appealed, maintaining, in his case, that the interlocutor complained of was contrary to the provisions of the act of the parliament of Scotland, 1592, cap. 117, and to those of the 54th Geo. III. cap. 169, intituled "An act to amend and render more effectual an act passed for the better raising and securing a fund for a provision for the widows and children of the ministers of the Church of Scotland," and is injurious to the rights of the appellant, as general collector of the said fund, under and by virtue of these acts.

The respondents supported the judgment on the following grounds :—1. No vacancy in the parish of Cambusnethan was created by the sentence of deposition pronounced against Mr. Livingston by the General Assembly, on the 27th May 1842, in respect the sentence could not receive any civil effect—the patron having been interdicted by the civil court from presenting to the benefice, and the church judicatories having been interdicted from carrying it into effect ; and in respect that, during the suspension of the operation of the said sentence by the interdicts of the Court of Session, Mr. Livingston continued in possession of the benefice. 2. Mr. Livingston having been maintained in possession of the benefice, during the period embraced in the competition, by the interdicts of the Court of Session, and having, by legal authority, discharged all the functions of minister of the parish, was entitled to draw the stipend payable for the period in question. 3. Generally, the parish not having been vacant during the period embraced in the competition, there is no foundation for the claim of the appellant to be preferred to the fund, which was not vacant stipend, in the sense and meaning of the act of parliament.

Rolt Q.C., and *R. Palmer* Q.C., for the appellant.—The interlocutor of the Court below, repelling the claim for the Widows' Fund, was wrong. The respondent was deposed in May 1842, and the sentence was regularly intimated, and executions of intimation duly reported to the presbytery and the patron. The stipend was vacant from that date within the meaning of the Ministers' Widows' Fund Act, 54 Geo. III. cap. 169 ; 1592, cap. 117 ; 1685, cap. 18. The collector of the Widows' Fund is put in place of the patron, who, by the prior statutes, was bound to apply the stipend due from 1842 to pious uses. It is said, that there was an interdict which suspended the sentence. But that interdict was applied for on grounds which were not maintainable, as was afterwards settled by the case of *Livingston* v. *Proudfoot*, 8 D. 898 ; 6 Bell's Ap. 469. The other interdicts were also quite unfounded, and therefore due effect ought to be given to the sentence of the Assembly, as if no interdict had ever been granted. The respondent's title was determined to be bad, and must be taken to have been bad from the date of the sentence, and to draw back to that date. The bar created by an interdict is not like the temporary suspense caused by an appeal, for, till the appeal is decided, the cause is not properly and conclusively decided on the merits, whereas a sentence stopped by an interdict is final and conclusive at once, provided it was within the jurisdiction of the Court. Hence the intermediate possession must be regulated by the sentence, whenever it is ascertained as the result, that that sentence was valid and competent. The Court is not bound to declare the intermediate possession valid merely because it was protected by its own interdict, for an interdict can be declared void, and reduced like any other act, and the possession under it may be declared to be wrongous, especially when it is considered interdicts are often granted, in the first instance, without argument. In *Gordon* v. *L. Kinnoull*, 4 Bell's Ap. 126, the House inquired into the reason of the prolonged vacancy of the benefice, and ordered the accumulated stipend to be paid to the Widows' Fund, because it was the fault of the presbytery and not of the collector of the fund ; so also in *Clark* v. *Presbytery of Dunkeld.*

Anderson Q.C., and *Mundell*, for the respondents.—The question is, whether the stipend was vacant, in 1842, from the date of the sentence of deposition. The mere sentence of itself does not create a vacancy. It was necessary for the sentence to be extracted, and for the civil court to give effect to the sentence by ejecting the incumbent, and this was never done. The sentence was merely an inchoate act, and all the ulterior effects of it were suspended by the interdicts. The question is, therefore, whether the Court of Session could declare a vacancy to exist before the interdict was recalled. The interdict was a good title of possession, and the fact of the possession continuing good, and the duties being discharged by the respondent, necessarily inferred, that no vacancy had yet occurred.

LORD CHANCELLOR CAMPBELL.—My Lords, I am of opinion the interlocutor appealed

[1] See previous reports 13 D. 394, 649 : 23 Sc. Jur. 171. S.C. 32 Sc. Jur. 514.

against ought to be affirmed. There are two grounds upon which it has been supported. The one is the necessity of an extract of the sentence; the other is the interdict, which was in full force at the time that the suit of multiplepoinding was commenced. Upon the first ground I do not feel so strongly as upon the second. Upon the first I should have entertained serious doubts, but I hardly think it necessary for me to give any opinion upon the first ground, because upon the second I entertain no doubt whatever.

Now, my Lords, I will assume, that the sentence of the presbytery on the 27th of May 1842 was regular and valid, and that that was a sentence of deprivation; and that, if there had been no interdict and no extract of the sentence, it would have made the benefice vacate, so that there would have been a vacancy from that time. But it seems to me, that, when there was on the following day an interdict by lawful authority, forbidding any party whatsoever to do anything under that sentence, that prevented Dr. Grant, until the interdict should be recalled, from lawfully claiming the vacant stipend.

Now the prayer of the interdict, which was granted in the terms of the prayer, was, "May it please your Lordships, to suspend the proceedings and sentence complained of, and to interdict, prohibit, and discharge all execution and intimation of the same, and all pretended proceedings in furtherance or pursuance of the same, and any attempt in any way whatever to carry the same into effect, and from doing any act or thing prejudicial to the status, rights, and privileges of the complainer as such incumbent."

Now this was an interdict which the Court of Session had an undoubted right to pronounce, and which, by the law of Scotland, ought to have been obeyed. I say, that that prevented Dr. Grant, while it was in force, from claiming from the heritors of the parish the vacant stipend, or rather, the stipend which might otherwise have been considered the vacant stipend. That was doing something in execution of the sentence, and attempting to carry the same into effect, because it was by virtue of that sentence, that the benefice became vacant, and that Dr. Grant, representing the Widows' Fund, had a right to the vacant stipend. That was doing an act prejudicial to the status and privileges of the complainer as such.

Now, let us see what was the state of things at that time. The sentence of deprivation pronounced by the General Assembly was impeached upon the ground, that it was pronounced by a tribunal not properly constituted; that the tribunal so constituted had no jurisdiction; and that, therefore, that sentence of deprivation was unlawful, and null and void. That was a very grave question to be determined. The effect of the presence of those ministers *quoad sacra*, who were not properly members of the Assembly, was a new question, and by no means without difficulty. That sentence was brought before this House, and after long discussion it was held, that the sentence had been properly pronounced. But the House might have been of a contrary opinion, and in that case the interdict would not have been recalled, and Mr. Livingston would have remained the incumbent of Cambusnethan, and entitled to all the profits of the living. Therefore, until that was determined, it was impossible to say, whether the sentence was a good or valid sentence or not. The proceeding on which the interdict was granted was not, strictly speaking, an appeal, because the Court of Session is not an appellate court from the General Assembly; but it had all the effect of an appeal; and, by the law of that part of the United Kingdom, it prevented that sentence being carried into effect until it should be reviewed by the Court of the highest authority in this country. It must, as I conceive, be of the same nature as if it had been an appeal. That being so, we find, that the multiplepoinding suit was commenced on the 8th of July 1844, when this interdict was still in force, and I cannot consider, that it was competent to Dr. Grant at that time to claim the vacant stipend. It was then a matter wholly uncertain and contingent whether he should be entitled to it, or whether it should not remain the property of Mr. Livingston. Upon these grounds it seems to me, that if the multiplepoinding had been heard immediately while the interdict was in force, there ought not to have been judgment for Dr. Grant. We are not now considering the rights of Mr. Livingston, but the rights of Dr. Grant, who is the appellant at our bar; and if the multiplepoinding had been heard and decided upon at the time, the interdict still remaining in full force, I think there ought to have been judgment against him. I do not think, that the circumstance of the subsequent proceedings, whereby the interdict was reduced, can be of any effect to make it a nullity. It has indeed appeared in the result, that the interdict was erroneous, and ought not to have been granted, and that the Court, upon hearing the merits of the case, ought to have come to the conclusion, that the sentence of deprivation was properly pronounced; but still, if nothing had been done to get the interdict recalled, I think it would have been an absolute bar to the claim of Dr. Grant. I do not think, that the judgment subsequently pronounced, reducing the interdict, made it a nullity previously to that time. I think it had the same force, till it was reduced, that it would have had if it had been found to have been properly issued.

Therefore, my Lords, without entering into the question of the necessity of the extract, it seems to me, that, upon these grounds, upon which Lord Fullerton mainly relies, I must advise your Lordships that the judgment be affirmed.

LORD CRANWORTH.—My Lords, I have come to the same conclusion with my noble and learned friend, though, I must own, not without considerabie fluctuation of opinion during the argument. If the matter had turned upon what I at first supposed that it would turn upon, namely, the construction of the old statute which was referred to, I should very much incline to concur in the argument which has been pressed on the part of the appellant, that the church became absolutely vacant upon the pronouncing of the sentence of deprivation by the General Assembly. But I do not think it does turn upon that point. The question turns upon this—What judgment ought the Court of Session to have given if they had been called upon to pronounce finally upon the matter on the 8th July 1844? Because, although the proceedings have been long protracted since that time, the question is—What were Dr. Grant's rights at the time when he intervened by his action of multiplepoinding in the month of July 1844? That is the question that is to be determined.

Now at that time both the interdicts (but the latter I chiefly refer to) were in full force. And the law of Scotland is laid down distinctly by Lord Fullerton to be this: "These interdicts raised the question, whether or not the sentence was valid. And until that question was decided against him there could be no actual vacancy, because there was no sentence of deprivation which was undeniably valid and admitted of being carried into execution. While that question continued undecided during the continued operation of the interdicts, the sentence of deprivation was for every practical purpose suspended."

Now taking that, even with qualification, to be the law of Scotland, it is quite clear, that, on the 8th July 1844, it was incompetent to the Court of Session to pronounce in favour of Dr. Grant. And although a question might arise if similar proceedings had been or should be now instituted after that interdict has been got rid of, the question is not, What would be the result of an action instituted after 1850? but, What were the rights of the parties in 1844? Upon these grounds, my Lords, I concur with my noble and learned friend in thinking that the Court of Session was right, and that the interlocutor ought to be affirmed.

LORD WENSLEYDALE.—My Lords, I agree, that in this case the judgment of the Court below ought to be affirmed. There are two points to be considered in this case. First, Whether, if there had been no interdict, the judgment of the Court was right; and, secondly, What the effect of the interdict would be. Now, I have attentively considered the judgments of the Lord President, Lord Fullerton, and Lord Cuninghame, and I see no sufficient ground for thinking, that the judgments of the majority of the Judges in this case are not perfectly right. It seems to me, that they accord perfectly with good sense. I quite agree, that the effect of the sentence of the General Assembly is to vacate the benefice in some sense. But does it vacate it absolutely, so as to make the benefice absolutely void? or is it only to be a ground of further proceedings by which it must be vacated in point of fact? Now my impression is, that the judgment of the Lord President is perfectly right; that the heritors cannot take notice of the sentence of deposition until they have been served with an extract of formal notification of the judgment. After that notice they then know the person to whom they ought to pay the stipend, but till that is done I cannot satisfy myself, that the benefice is vacant in any respect whatever in point of law. It may be, as Mr. Anderson contends, that it is necessary to have recourse to civil process, in order to carry that sentence into effect. I cannot say, that I am satisfied upon that point. It seems to me, however, that something is required to be done. The Lord President having intimated his opinion, that there ought to be an extract or formal notification in order to make the sentence valid, that seems to me so perfectly well founded, that I rely upon it. Therefore, upon that ground, I think the judgment of the Court below ought to be affirmed.

With respect to the other point, I am strongly inclined to the opinion of my noble and learned friend on the woolsack, though I feel some difficulty about it. It does seem a hardship, that the claimant who made his claim in July 1844, and who now turns out to be really entitled to it, should be deprived of that advantage by a subsequent interdict which ought not to have issued. I feel considerable doubt upon that part of the case. Certainly I am not satisfied, that the judgment of the Court below was wrong. On the contrary, I think it was perfectly right.

LORD CHELMSFORD.—My Lords, after a most careful and anxious consideration of this case, I cannot bring my mind to the conclusion at which my noble and learned friends have arrived; but out of deference to their judgments, I think it would not be right for me to give any expression to my doubts, and therefore I shall decline to express any opinion upon this case with respect to these interlocutors.

I would suggest to your Lordships whether it ought to be with costs in this case.

LORD WENSLEYDALE.—Without costs, I think.

LORD CHANCELLOR.—The rule for a great many years has been, that the victor should have his costs, but that is subject to exceptions.

LORD CRANWORTH.—I think there should be no costs.

Mr. Anderson.—If we do not get the costs here, we shall derive little benefit from the appeal.

Mr. Rolt.—My learned friend is not entitled to have a second argument.

LORD CHANCELLOR.—I was glad to hear my noble and learned friend propose, that the judgment should be without costs. I should hardly have ventured to propose it myself, but I rejoice in it.

Interlocutors in both appeals affirmed.

For Appellant, Spottiswoode and Robertson, Solicitors, London; H. M. Inglis, W.S., Edinburgh.—*For Respondents*, Deans and Rogers, Solicitors, London; Wotherspoon and Morison, S.S.C., Edinburgh.

MAY 14, 1860.

MRS. JANE MARSHALL or HOUSTON (Executrix of the late Robert Houston), *Appellant*, *v.* THE MAGISTRATES OF GLASGOW, *Respondents*.

Burgh—Minister's Stipend—Common good of Burgh—Statute, Construction of—Glasgow Municipal Act, 9 and 10 Vict. c. 289, § 14—*By the act 9 and 10 Vict. c. 289, the municipality of Glasgow was extended over Gorbals parish; and by the 14th section "the common good and property, heritable and moveable, and means and revenues, and income of every description," belonging to the barony of Gorbals, was transferred to, and vested in, the town council.*

HELD (affirming judgment), *That in construing the Statute, the corporation of Glasgow were not liable for the arrears of stipend due to the minister of the parish of Gorbals, the parish having been constituted by decree of the Teind Court, and the property yielding stipend not having been part of the common good of the barony.*[1]

The judgment of the Court of Session having been brought under the review of the House of Lords, the appellant maintained, in her *printed case*, that the judgment should be reversed—1. Because, according to the sound interpretation of § 14 of (the Glasgow Municipality Extension Act) 9 and 10 Vict. cap. 289, the whole property of the barony of Gorbals, including the subjects in question, was subject to the liabilities thereof, transferred to and vested in the council of the extended city of Glasgow. 2. Because the distinction relied on by the respondents between the "barony of Gorbals" and the "village of Gorbals" had no foundation in point of fact, so far as related to the application of the 14th section of the statute. 3. Even if the respondents could establish that the village of Gorbals still existed as a separate corporation, distinguishable from the barony of Gorbals, and that the church and other property belonged to the village and not to the barony, the property would be carried to the respondents by the Municipality Extension Act.

The respondents, in their *printed case*, supported the judgment on the following grounds:—1. The property in question never having formed part of the common good or property of the barony of Gorbals, and never having been held or adminstered for its behoof, was not transferred to the respondents by the 14th section of the Glasgow Municipal Extension Act. 2. The property, rights, and liabilities in question were expressly excluded from the operation of the said act. 3. According to the sound construction of the act, the respondents were not bound to take over the said property, or to make payment of the arrears of stipend concluded for. 4. The appellant had not averred any case relevant or sufficient to entitle her to maintain the opposite construction. On the contrary, her own allegations, taken in connexion with the statutory provisions founded on, as well as the documents or writings in process, shewed conclusively that her pleas were all untenable in law and fact.

R. Palmer Q.C., and *Neish*, for the appellant.—According to the true construction of the act 8 and 9 Vict. c. 289, § 14, the whole property of the barony of Gorbals passed to the city of Glasgow, subject to its liabilities. The question is, whether this church was part of the common good belonging to the barony of Gorbals. All the formal titles of the lands represent, that these lands are to be held for the use of the inhabitants or feuars of Gorbals, and it cannot be said, that it was part of the property belonging to the village of Gorbals. There is, in fact, no distinction between those two expressions, for the village was merely the name given to the barony in its earlier and transitional stage. But even if the village was something distinct from the barony, still the property belonging to both passes by the words of the Statute 8 and 9 Vict. c. 289, § 4.

The *Lord Advocate* (Moncreiff), and *Sir H. Cairns* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR CAMPBELL.—My Lords, this is an action brought against the magistrates of Glasgow for a stipend alleged to be due from them to Mr. Houston, late the minister of the

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[1] See previous reports 19 D. 734 : 29 Sc. Jur. 331. S. C. 32 Sc. Jur. 516.